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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 206

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals,
Eighth Circuit,
and
SUPPORTING BRIEF.

FRANKLIN E. REAGAN,
Boatmen's Bank Building,
St. Louis, Missouri,
JOHN W. GIESECKE,
HAROLD C. ACKERT,
706 Chestnut Street,
St. Louis, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals,
Eighth Circuit.**

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of D'Oench, Duhme & Co., Inc., respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

This suit was originally instituted by Federal Deposit Insurance Corporation in the United States District Court for the Eastern Division of the Eastern District of Missouri by filing a complaint in conventional form (R. 3) as a suit on a certain promissory note executed by D'Oench, Duhme & Co., Inc., petitioner herein, in the sum of $5,000.00 and pay-

able to the Belleville Bank & Trust Co. of Belleville, Illinois, as per exhibit attached to the petition (R. 13). The defendant, petitioner herein, in due course filed its answer (R. 6) alleging, among other things, that said note was given to the payee without consideration, that plaintiff was the holder thereof after maturity, and denied that plaintiff was a holder in due course.

Plaintiff filed a reply (R. 10) in the nature of a general denial coupled with a plea of estoppel to assert the defense of no consideration. Defendant's motion to strike the reply was submitted and overruled (R. 9).

The cause came on for hearing November 20, 1939, before the Court sitting without a jury, at which time the parties presented their evidence. Plaintiff did not plead and did not offer any evidence to prove the law of Illinois.

Judgment was rendered January 8, 1940, in favor of plaintiff (R. 72), and findings of fact (R. 66) and conclusions of law (R. 71) were filed by the Court. A motion for new trial (R. 73), asserting among other things the trial court erred in not finding that plaintiff was not a holder in due course, was duly filed January 20, 1940, and overruled February 5, 1940, at which time additional findings of fact and conclusions of law were filed by the Court (R. 75), one of the conclusions of law being that the rights of the parties are governed by the laws of Illinois. An appeal to the United States Circuit Court of Appeals for the Eighth Circuit was duly taken, and the judgment of the lower court was affirmed (R. 94) in an opinion filed February 11, 1941 (R. 87/94), which decided, among other things, that the place of contract was Illinois and that the plaintiff was a holder in due course or had a status equivalent thereto under the law of Illinois.

In reaching the conclusion that the place of contract was Illinois the Court applied the "general" law (R. bottom p.

89, top p. 90). In reaching the conclusion that the plaintiff was a holder in due course, or had a status equivalent thereto, the Court applied solely the law of Illinois as determined from the opinions of the Illinois courts, saying (R. 91):

> "The courts of Illinois appear to have taken the view that, notwithstanding the provisions of the Negotiable Instruments Law and the clause added to Section 29 by the Illinois Legislature, one to whom accommodation paper is negotiated, in good faith and for value, is in the position of, or equivalent to, a holder in due course, whether he acquires title before or after maturity. This construction necessarily is binding on us."

As authority for this statement the Court cited and discussed only Illinois decisions (R. 91/93).

The necessary effect of the decision in this case is:

1. To disregard and violate the principles announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64,** and subsequent cases, and is in conflict with the decisions of this Court in **Klaxon Company v. Stentor Electric Manufacturing Co., Inc., ... U. S. ..., 85 L. Ed. 969 (Advance Sheets),** and **Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972 (Advance Sheets),** in that the Circuit Court of Appeals failed to apply the substantive law of the forum state in determining the place of contract.

2. To disregard and overrule the contention of the appellant, petitioner herein, that as the law of Illinois had neither been pleaded nor proved, the case if governed by Illinois law should be decided under the Missouri law, which presumes the Illinois law to be the same as the Missouri law absent pleading and proof thereof. This contention is based upon the applicable rules of law as laid down by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64.** The Circuit Court of Appeals for the Eighth Circuit

made no reference in its opinion to this point raised by the appellant, petitioner herein, in its statement of errors (R. 81/85), but the Court could only have reached the result it did and could only have applied and solely relied upon Illinois law as found in the reported decisions of the Illinois courts by in fact overruling, disregarding and holding against the contention of this petitioner as aforesaid. Appellant's petition for rehearing was filed February 21, 1941 (R. 95/98), and clearly called to the Court's attention this point, but said petition for rehearing was denied on March 27, 1941 (R. 99).

Furthermore, the necessary effect of the decision brings the Circuit Court of Appeals for the Eighth Circuit in direct conflict with the decisions of the United States Circuit Court of Appeals for the Third Circuit in the cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc., and Warfield v. same, 116 F. (2d) 254, l. c. 257.** Those cases squarely hold, contrary to the necessary effect of the ruling of the Circuit Court of Appeals for the Eighth Circuit in this case, that:

> "But, no proof of the law of Maryland was introduced at trial in the District Court (E. D. Pa.). In further effectuation of the policy of federal jurisprudence enunciated in **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487,** it would seem proper for a federal court to follow the rule of the state of the forum on a question of conflict of laws. See **Goodrich, Conflict of Laws (2d Ed.), para. 12.** Accordingly, we resort to the pertinent rule of law of Pennsylvania, the forum state of the trial court. There it is well settled that, in the absence of evidence to the contrary, the common law of another common-law state is presumed to be the same as the common law of Pennsylvania (citing cases)."

3. To disregard and violate the principles announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64,**

and subsequent cases, and is in conflict with the decision of this Court in **Griffin v. McCoach, ... U. S. , .., 85 L. Ed. 972 (Advance Sheets)**, in that the Circuit Court of Appeals has applied a foreign law repugnant to the substantive law of the state of the forum when the forum state would not apply it.

B.

STATEMENT DISCLOSING BASIS OF JURISDICTION.

1. The original date of the judgment to be reversed is February 11, 1941 (R. 94). Petition for rehearing was filed February 21, 1941, within the time provided for by the rules of the United States Circuit Court of Appeals (R. 98) and the petition for rehearing was denied March 27, 1941 (R. 99).

2. The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A., Title 28, Section 347.

C.

QUESTIONS PRESENTED.

1. Whether a federal court must apply the rule of conflicts of law followed in the state of the forum to determine what law governs the place of contract.

2. Whether the principles of law announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64**, require a Federal District Court to apply the law of the state of the forum to determine whether a foreign law will be judicially noticed or must be pleaded and proved.

3. Whether a federal court may apply a foreign law repugnant to the law of the forum state where the forum state would not apply such law because of repugnance.

4. In the interest of brevity (**Rule 38, para. 2; Furness, Withy Co., Ltd., v. Lang-Tsze Insurance Assoc., Ltd., 242 U. S. 430**) petitioner does not at this time set forth all of the questions which will be urged in the argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such questions, but in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (**Gunning v. Cooley, 281 U. S. 90, 98**), petitioner here refers to and incorporates into this petition all of the matters presented in its statement of errors and points relied upon on the appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. 81/85) with the same force and effect as if herein set out in full.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Because the decision of the Circuit Court of Appeals for the Eighth Circuit in this case is in direct conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the two cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.** and **Warfield v. same, 116 F. (2d) 254.**

2. Because the United States Circuit Court of Appeals for the Eighth Circuit has decided important questions of federal law which have not been but should be settled by this Court.

3. Because the Circuit Court of Appeals has decided federal questions in probable conflict with the applicable decisions of this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64,** and subsequent decisions, especially **Klaxon Co. v. Stentor Electric Manufacturing Co., ... U. S. ..., 85 L. Ed. 969** (advance sheets); **Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972** (advance sheets).

4. Because the present decision leaves in confusion the question as to whether federal courts will take judicial notice of the laws of all states or whether they will follow the settled law of the state of the forum as to the necessity of pleading and proving the foreign law relied upon.

E.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit herein applied for should be granted.

FRANKLIN E. REAGAN,
JOHN W. GIESECKE,
HAROLD C. ACKERT,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

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BRIEF IN SUPPORT.

I.

THE OPINION OF THE COURT BELOW.

No opinion was delivered by the District Court. The opinion of the Circuit Court of Appeals of the Eighth Circuit (written by Johnsen, J.) was filed February 11, 1941, and appears on record pages 87 to 94. It is reported in 117 F. (2d) 491.

II.

JURISDICTION.

The essential facts relative to the jurisdiction of this Court are fully stated in the accompanying petition for certiorari (supra, page 5) and in the interest of brevity are not repeated here.

III.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for certiorari (supra, page 1) and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument, which follows.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in determining the place of contract by applying the "general" law rather than applying the law of the forum.

2. The Circuit Court of Appeals erred in determining the Illinois law by solely applying decisions from that state, although the case was tried in the District Court of Missouri and no Illinois law was pleaded or proved.

3 The Circuit Court of Appeals erroneously failed to apply the applicable principles announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64**, and improperly took judicial notice of the law of Illinois rather than applying the rule of the state of the forum, Missouri, which clearly provides that where a foreign law is neither pleaded nor proved it will be presumed to be the same as the law of Missouri, and the Court, therefore, erroneously determined the Illinois law from the Illinois decisions rather than the Missouri decisions.

4. The Circuit Court of Appeals erred in applying a foreign law repugnant to the substantive law of the forum state.

5. The Circuit Court of Appeals erred in holding that under the applicable law the endorsee of the note sued on, given for the accommodation of the payee and negotiated more than five years after its execution, was a holder in due course.

6. The Circuit Court of Appeals erred in affirming the judgment for the plaintiff.

V.

ARGUMENT.

1.

At the very outset the Court of Appeals was called upon to determine whether the note sued on in this case was an Illinois or a Missouri contract. The Court of Appeals decided this question by applying the "general" law (R. bottom p. 89, top p. 90) and made no attempt to apply the law of Missouri, the forum state, to determine the place of contract. Not a single Missouri case was cited or referred to on this point; for that matter, not a single Missouri case was cited or referred to in the entire opinion.

That the procedure followed by the Circuit Court of Appeals which determined the place of contract by "general" law rather than the law of Missouri, the forum state, is clearly erroneous has now been settled beyond any question of doubt by the recent decision of this Court in **Klaxon Co. v. Stentor Electric Manufacturing Co.**, decided June 2, 1941, ... **U. S.** ..., **85 L. ed. 969** (Advance Sheets). In that case the District Court sitting in Delaware had decided an important question in the case and determined that the New York law was applicable, but apparently followed its independent determination of the "better view of the law" without regard to the Delaware law, for no Delaware decisions or statutes were cited or discussed (as no Missouri decisions or statutes were cited or discussed in the instant case by the Court of Appeals). This Court unequivocally ruled such procedure erroneous, saying, at page 971 (Advance Sheets, supra):

> "We are of opinion that the prohibition declared in **Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487**, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws

rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. See **Erie R. Co. v. Tompkins, supra, at 74-77.** Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. * * * This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. **Funkhouser v. J. B. Preston Co., 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134.** And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

This Court similarly held in **J. Rob Griffin, Admr., v. McCoach,** decided June 2, 1941, ... **U. S.** ..., **85 L. ed. 972** (Advance Sheets). In that case a federal court in Texas had decided that the insurance contract in suit was governed by the laws of New York, but, as this Court pointed out, the question as to whether the changes made in the insurance contract left its governing laws unaffected was made by "applying rules of law in a way which may or may not have been consistent with Texas decisions." Further, this Court pointed out that the opinion did not "rest its conclusions upon its appraisal of Texas law or Texas decisions but upon decisions of this Court inapplicable to this situation in light of Erie R. Co. v. Tompkins." Accordingly the case was reversed and remanded for a determination of Texas law.

The principles announced in the foregoing cases are entirely applicable to the case at bar. In fact, the Court of Appeals unquestionably had in mind that the Erie case required application of substantive state law, for it held that the construction of the Illinois courts "necessarily is binding on us" (R. 91). However, it clearly overlooked

the fact that in determining the first question, namely, the place of contract, the rule of conflicts of law as announced by the Missouri courts is determinative of the initial question in this case, as required by the Erie case. No distinction whatever exists between the cases except that in the cases quoted, as well as the Erie case, jurisdiction was invoked under the applicable federal statute giving the federal court jurisdiction because of diversity of citizenship. Jurisdiction in the present case is governed by U. S. C. A., Title 12, Section 264 (j) (Fourth), which permits the plaintiff corporation to sue or be sued in any state or federal court. The situation is indistinguishable on principle from the diversity of citizenship jurisdiction. In both cases both state and federal courts have concurrent jurisdiction. In this situation the spirit of the Erie and subsequent cases calls for a uniformity of decision so as not to "disturb equal administration of justice in coordinate state and federal courts sitting side by side."

It seems from a careful study of the Erie case that the fundamental principle announced by this Court is that the federal courts do not have the power to declare rules of decision in the broad field of "general" law, for this Court has said that the unconstitutionality of the course pursued pursuant to the decision in Swift v. Tyson "has now been made clear," and further that

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. * * * There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts" (l. c. 78). (Emphasis supplied.)

In the case at bar the first question of general law for determination is, "What is the place of contract?" Obvi-

ously this question does not present any matter "governed by the Federal Constitution or by Acts of Congress."

The Erie case, though one involving diversity of citizenship, goes into more basic propositions of law for the rule upon which the decision in that case is reached and announces the broad principle that the federal courts are without the constitutional authority to declare rules of decision in the broad field of "general" law. As pointed out by Mr. Justice Holmes in **Kuhn v. Fairmont Coal Co., 215 U. S. 349**, and as referred to by this Court in the decision in the opinion of the Erie case (l. c. 79), the fallacy underlying the rule declared in Swift v. Tyson is in the assumption

> "that federal courts have the power to use their judgment as to what the rules of common law are, there being no federal general common law."

There is, therefore, nothing except state law to which the federal courts may refer for a determination of the questions presented in this case which arose with respect to a note originally given by a citizen of Missouri to a citizen of Illinois and which later came to the plaintiff through pledge and foreclosure. That being so, it is unimportant whether jurisdiction in the federal court is invoked by reason of diversity of citizenship or on some other basis giving the state and federal courts co-ordinate jurisdiction.

This view of the principles of the Erie case is held by the United States Circuit Court of Appeals for the Sixth Circuit. That Court, in **Mishawaka Rubber & Woolen Manufacturing Co. v. S. S. Kresge Co., 119 F. (2d) 316** (Advance Sheets), a case in which no diversity of citizenship appears, jurisdiction resting on another act of Congress (the trade-mark statutes), said:

"The registration of appellant's trade-marks did not enlarge its substantive rights. All it did was to confer jurisdiction upon the court regardless of diversity of citizenship and give registrant certain procedural advantages (citing cases).

"Whatever substantive rights appellant may have in the premises arises under local law and are within the scope of **Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487; Kellogg Co. v. National Biscuit Co., 305 U. S. 111, 59 S. Ct. 109, 83 L. ed. 73.**"

As in the case at bar, jurisdiction of the state and federal courts was concurrent or co-ordinate, but not by reason of diversity of citizenship.

2.

The Court of Appeals having ruled the place of contract was Illinois, then ascertained the law of Illinois by taking judicial notice of various decisions of the Illinois appellate courts and held that under such Illinois decisions the plaintiff endorsee had the status of a holder in due course. That such was the process by which the Court ascertained the Illinois law is self-evident, for in the first place the Court's opinion (R. 87-94) not only so states, but it cites and relies solely upon Illinois decisions although no Illinois decisions or laws were pleaded or proved by the plaintiff at the trial of the case which was held in the District Court of Missouri.

The Court applied the Illinois decisions to a final determination of the merits, saying that "no matter how illogical or ill-considered" (R. 93) the Illinois cases may be, they were necessarily binding upon the federal court despite the fact that "* * * the construction of the Negotiable Instruments Law made by the Illinois courts represents a minority American viewpoint * * *."

The question as to whether a state will require pleading and proof of a foreign law is one upon which the courts of the forty-eight states are not in agreement. However, it has long been the substantive law in Missouri that the courts of that state will not take judicial notice of the law of any foreign state; that such law must be pleaded and proved if a party expects to rely thereon, and that a foreign law which has not been pleaded or proved will be presumed to be the same as the law of Missouri. See **Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. (2d) 591, 599; Madden v. Railroad, 192 S. W. 455, 456 (Mo. Sup.); Kinsley Bank v. Woods, 61 S. W. (2d) 384 (Mo. App.); Gordon v. Andrews, 2 S. W. (2d) 809 (Mo. App.) (Illinois law involved).**

There is no question but that if this case had been tried in the state court in Missouri under the identical record here presented, and even if the Missouri Court had reached the conclusion under the Missouri law that this was an Illinois contract, governed by the laws of Illinois (as did the Circuit Court of Appeals, although not by application of Missouri law), the Missouri court would have ascertained the Illinois law, not from the Illinois decisions, but from the Missouri decisions, for the reason that the Illinois law not having been pleaded or proved would be presumed to be the same as the Missouri law. The fundamental purpose and ruling of the Erie and subsequent cases was to bring a uniformity of decisions between state and federal courts within the same forum and to prevent different results being reached in the same case depending upon whether the cause was tried in the state or the federal court. (**West v. American Telephone & Telegraph Co.**, decided December 9, 1940, . . . **U. S.** . . ., **85 L. Ed. 146** [Advance Sheets], and **Fidelity Union Trust Co. v. Field**, decided December 9, 1940, . . . **U. S.** . . ., **85 L. Ed. 176** [Advance Sheets].) It seems self-apparent that upon the rec-

ord in this case a proper application of the doctrine of the Erie case would require the District Court and the Circuit Court of Appeals to disregard the Illinois decisions and to decide this case solely upon the Missouri decisions.

This Court prior to the decision in the Erie case uniformly applied the very rule for which we are contending to cases which came to this Court on writ of error or certiorari from a state court (see: **Hanley v. Donoghue, 116 U. S. 1; Renaud v. Abbott, 116 U. S. 277**), although this Court did not apply the rule in cases coming up through the federal courts for the reason that it was then the accepted rule of "general" federal law that the federal courts took judicial notice of the laws of all states. However, the Erie case held there was no "general" federal law. Therefore, the rule of state law applicable in a particular forum must be applied in all cases where there is concurrent jurisdiction of both state and federal courts, as here.

The United States Circuit Court of Appeals for the Third Circuit has held exactly as petitioners in this case contend. In two cases recently presented to that court which are on "all fours" with the case at bar, the Third Circuit has decided the identical point in a directly contradictory fashion to the necessary implication of the decision in this case. In the cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.**, and **Warfield v. same, 116 F. (2d) 254**, the Court held, l. c. 257:

> "But, no proof of the law of Maryland was introduced at trial in the District Court (E. D. Pa.). In further effectuation of the policy of federal jurisprudence enunciated in **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487**, it would seem proper for a federal court to follow the rule of the state of the forum on a question of conflict of laws. See **Goodrich, Conflict of Laws (2d**

Ed.), para. 12. Accordingly, we resort to the pertinent rule of law of Pennsylvania, the forum state of the trial court. There it is well settled that, in the absence of evidence to the contrary, the common law of another common-law state is presumed to be the same as the common law of Pennsylvania (citing cases)."

The Waggaman case has recently been referred to with apparent approval by this Court in the Klaxon case, supra, and has been followed by at least one lower federal court. See **A. B. v. C. D., 36 F. Supp. 85.** The law of Missouri is the same as the law of Pennsylvania, namely, that in the absence of evidence to the contrary the law of a foreign state will be presumed to be the same as the law of the forum. In the Waggaman case the Court held that the cause of action was controlled by the law of Maryland, but inasmuch as the law of Maryland had not been pleaded or proved, the Pennsylvania decisions were solely used and applied, because under the Pennsylvania rule the Maryland law was presumed to be the same as the law of Pennsylvania. The federal court was not privileged to take judicial notice of what the Maryland decisions might actually have held, but was bound by the fundamental rule of the state of the forum and the presumption thereby created.

It is self-evident that although the Eighth Circuit did not rule this point in specific language, nevertheless that circuit does not consider pleading and proof of a foreign law necessary in a federal court and will continue to take judicial notice of a foreign law despite the substantive law of the forum state requiring pleading and proof. This, therefore, creates a direct conflict of authority between the views entertained by the Third Circuit and the Eighth Circuit.

Not only is a novel question presented on which there

has now developed a direct conflict in the position taken by two United States Circuit Courts of Appeals, but an important question of federal law is presented which has not been, but should be, settled by this Court. It is obviously important that litigants and federal practitioners know with certainty at the earliest possible moment whether they must plead and prove foreign laws when they expect to rely upon them (as held by the Third Circuit) or whether the old rule of taking judicial notice will apply despite the Erie and subsequent decisions (as is the necessary effect of the decision of the Eighth Circuit in this case). The present decision not only creates an irreconcilable conflict with the decision of the Third Circuit but leaves in confusion this important question presented in this case.

It is pertinent to here point out that, had the Missouri decisions been applied in this case, the result on the merits would have been exactly contrary, for, even though the Illinois law be as the Court of Appeals found, it is directly contrary to the Missouri law that a demand note executed more than five years previously is past due and one acquiring a past-due note is not a holder in due course. See **Franklin Bank v. St. Louis Car Co., 9 S. W. (2d) 901 (Mo. Sup.); Gate City National Bank v. Schmidt, 168 Mo. App. 153, l. c. 158, 152 S. W. 101; Miller v. Peoples Savings Bank, 193 Mo. App. 489, l. c. 508, 186 S. W. 547.**

That the Erie case intended the result reached in a federal court sitting in Missouri would be identical with the result reached in the same case had it been tried in the state court of Missouri is made unquestionably apparent by the subsequent decisions of this Court. In **Fidelity Union Trust Co. v. Field**, decided December 9, 1940, ... **U. S. ..., 85 L. ed. 176 (Advance Sheets)**, Mr. Chief Justice Hughes concluded the unanimous opinion of this Court by saying (l. c. 179):

"The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

To the same effect see **West v. American Telephone & Telegraph Co.**, supra.

It has already been demonstrated that, had this case been tried in the state court of Missouri on the identical record here presented, the Missouri court, because of the failure to plead and prove the law of Illinois, would have presumed that law to be the same as the Missouri law and would, therefore, have determined the Illinois law by solely looking to the Missouri decisions; that, had the Missouri decisions rather than the Illinois decisions been applied, the result on the merits would have been directly opposite, as the plaintiff could not possibly have prevailed in the Missouri court. The entire result of this case is, therefore, directly opposite from what it would have been had the case been tried in a Missouri court, where it could have been tried. This is entirely out of harmony with and directly contrary to the spirit of the Erie case and the express rulings and theory of the cases above cited and quoted and is as afore pointed out in direct conflict with the rule on the specific point announced by the Third Circuit.

3.

The petitioner, defendant below, argued before the Circuit Court of Appeals (R. 95-96) that, regardless of whether this was an Illinois contract and regardless of whether the Illinois law was before the Court, no view of the law directly opposite and actually repugnant to the Missouri rule

should be applied by the federal court because a Missouri court would not enforce a repugnant foreign law, particularly against one of its own citizens, and a federal court sitting in the same state should not apply such a law. This conclusion flows inescapably from the Erie case and from the subsequent decisions which make clear that the result achieved in the federal court should be the same as would have been achieved in the state court in all cases where the two courts have concurrent jurisdiction. The Erie and subsequent cases require that the substantive law of the state be applied and, where that substantive law would prevent the application of a foreign law because of repugnancy, even if properly pleaded and proved, then the federal court must apply such state law. The Court of Appeals failed to determine whether a Missouri court would in fact refuse to apply the Illinois law because of repugnancy. In so failing to determine, the Circuit Court of Appeals disregarded its basic duty under the doctrine of the Erie and subsequent cases and is in direct conflict with the subsequent ruling of this Court in **Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972 (Advance Sheets).**

4.

It is respectfully submitted that the writ of certiorari should be issued.

FRANKLIN E. REAGAN,
JOHN W. GIESECKE,
HAROLD C. ACKERT,
Attorneys for Petitioner.